

May 20, 2002

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
TW-A325  
445 Twelfth St., SW  
Washington DC 20554



Re: *Ex Parte* presentation in MM Docket 95-31

Dear Ms. Dortch:

On May 16 and 17, 2002 Carol Pierson, President of the National Federation of Community Broadcasters ("NFCB") and Cheryl A. Leanza, Deputy Director of Media Access Project, held several meetings with respect to the above-captioned docket. On May 16, 2002, Ms. Pierson met with Susan Eid, Legal Advisor to Chairman Powell. On May 17, 2002, Ms. Pierson and Ms. Leanza met with Commissioner Martin and his advisor Catherine Crutcher Bohigian; Peter Doyle, Chief of the Audio Services Division; and Ken Feree, Deborah Klein, Bob Ratcliffe, Mary Beth Murphy, and Jim Brown, of the Media Bureau.

We generally described NFCB to staff unfamiliar with the organization. NFCB is a 26 year old membership organization for public radio broadcasters that emphasize community and volunteer involvement, and local programming. We explained that NFCB members are particularly anxious to comply with FCC rules and seek every opportunity to obtain information about FCC rules in simple terms that volunteers and non-lawyers can understand.

We discussed the issues highlighted on the attached briefing pages. We also provided copies of NFCB's comments, which are publicly available in the above-captioned proceeding. In addition, we emphasized the need for additional spectrum for public radio broadcasting, and suggested the FCC begin to seriously reconsider allocating TV channel 6 for noncommercial broadcasting.

Sincerely,

Cheryl A. Leanza  
Deputy Director

attachment

**National Federation of Community Broadcasters**  
**May 17, 2002**

- ◆ The Commission ought to begin opening a noncommercial filing window on a regular basis.
  - The Commission adopted a filing freeze in April 2000, over two years ago.
  - Top-priority applicants for NTIA's Public Telecommunications Facilities Program cannot receive appropriated federal funds unless the Commission accepts applications.
  - An unpredictable schedule forces applicants into a "land rush" mentality because they are unsure when an future application opportunity will be available.
  - A build-up of applicants will overwhelm staff later.
  - The Commission or the Bureau should announce a schedule of application windows. The best time of year for an application window with respect to PTFP would be in January of each year.
  
- ◆ The Commission should begin processing non-commercial mutually exclusive (MX'd) applications.
  - The Commission stopped processing MX'd applications in March 1995, over seven years ago.
  - The Commission adopted the comparative point system for MX'd applications in April 2000.
  - The Commission alleviated some of the backlog through allowing settlements among applicants in Summer 2001.
  - The Commission has previously stated it needs a legislative amendment to more speedily process MX'd applications. Public broadcasting stands ready to help advocate for such a change if it is needed.
  
- ◆ NFCB supports a reasonable accommodation for noncommercial applicants on non-reserved spectrum.
  - It appears from NPR's technical analysis that the FCC's proposed reservation standards for vacant and future allotments is reasonable.
  - Precluding NCEs from participating in auctions or from non-reserved spectrum entirely is not appropriate.
  - Commercial applicants should be allowed to dismiss their applications on the condition that the frequency be reserved for noncommercial purposes.
  
- ◆ NFCB has recently obtained a grant to pay for a staff person to assist LPFM stations and applicants.

**National Federation of Community Broadcasters  
Non-Commercial Comparative Standards Timeline  
(May 2002)**



- 1992 Commission initiates a broad review of all comparative standards criteria in GC Docket 92-52.
- 1993 D.C. Circuit decision in *Bechtel v. FCC*, 10 F.3d 874 causes Commission to seek further comment on comparative criteria.
- Mar. 1995 Commission issues a new *NPRM* in MM Docket 95-31 focusing on non-commercial licensees. ***FCC suspends processing of all mutually exclusive non-commercial applications.***
- May 1995 In response to the Commission's *NPRM*, NPR, APTS, and NFCB met to develop a joint proposal supporting comparative hearings.
- 1997 Congress passes 1997 Budget Act, which indicates Congressional disfavor with comparative hearings. Congress mandates auctions for mutually exclusive commercial applicants.
- Oct. 1998 Commission issues a *Further NPRM* on non-commercial comparative criteria, including a focus on lotteries as an allocation mechanism.
- Apr. 2000 Commission issues *Report & Order* adopting a point system for selecting among mutually exclusive applicants. ***Commission freezes all non-commercial educational applications.***
- Feb. 2001 Commission adopts *Reconsideration Order*, largely affirming its decision.
- Jun. 2001 Applicants update applications to indicate point allocation under point system.
- July 2001 D.C. Circuit concludes that Commission may not require non-commercial applications to participate in auctions.
- July 2001 Applicants allowed to settle mutually exclusive noncommercial applications.
- Aug.-Oct. 2001 Non-commercial broadcasters meet with Bureau staff, provide suggestions after D.C. Circuit decision.
- Feb. 2002 FCC releases *Second Further NPRM*, comments due May 15, 2002.

***Approximately 1,200 full power non-commercial mutually exclusive applicants and 2,600 mutually exclusive low power applicants are now awaiting a Commission decision.***

**Need for a Legislative Amendment to Expedite Processing of  
Noncommercial Broadcast Applications  
April 2002**

Currently there is an extensive backlog for processing competing noncommercial radio applications. The FCC officially stopped processing competing noncommercial applications in 1995 and has not yet resumed doing so. More than 1,500 full power applications and as many as 2,600 LPFM applications are awaiting action. The FCC has made considerable progress in moving on this backlog because it replaced the comparative hearing process with a point system in 2000. This point system will allow FCC staff to select among applicants and grant licenses. However, as the FCC has explained in several orders, because point systems are technically paper hearings, they cannot be delegated to the Bureau, and thus must be reviewed by the full Commission. Two years ago the FCC indicated its intent to seek a legislative amendment to remedy the problem. The Commission received a similar amendment in the past to process ITFS applications. This small, non-controversial legislative amendment will allow the Commission to more speedily process a serious and harmful backlog which is damaging the public's ability to receive noncommercial radio programming.

FCC Precedent on this Issue

In its order adopting a comparative point system for noncommercial applicants, the Commission directed the Office of Legislative and Intergovernmental Affairs to seek a legislative amendment that would allow the Commission to delegate authority to the Mass Media Bureau to administer the system. *See Reexamination of the Comparative Standards for Noncommercial Applicants*, FCC 00-120, 15 FCC Rcd 7386, 7420, ¶80 (2000). The Commission went so far as to include this item in its ordering clauses. *See id.* at 7438, ¶130.

In its *Further Notice* in the docket, the Commission explained that “a point system is technically considered a type of simplified hearing, and by statute we currently only have statutory authority to delegate authority over hearings to administrative law judges, or to individual Commissioners. *See* 47 U.S.C. § 155(c)(1).” FCC 98-269, 13 FCC Rcd 21167, 21176, n.22 (1998). According to the Commission's analysis, the Administrative Procedure Act imposes this limitation generally, but allows the Commission to receive delegation authority specifically granted by statute. *See* 5 U.S.C. § 556(b)(2) and (3); 11 FCC Rcd 12380-82 (1996). This problem is equally applicable to low power radio applicants. *See Low Power Radio Order*, 15 FCC Rcd 2205, 2264, ¶151 (2000).

The Commission has been successful in obtaining legislation of this type in the past. The 1996 Telecommunications Act included such authority for ITFS comparisons. Pub. L. No. 104-104, Sec. 403(c); 11 FCC Rcd 12380 (1996).

## Proposed Amendment

### Option #1

#### EXPEDITING NONCOMMERCIAL EDUCATIONAL BROADCAST STATION AND PUBLIC BROADCAST STATION PROCESSING --

Section 5(c)(1) (47 U.S.C. § 155(c)(1)) is amended by deleting the reference to "instruction fixed television service" and inserting the following: "except for cases involving services in which hearings are conducted in the form of a point system or similarly streamlined, objective method."

### Option #2

#### EXPEDITING NONCOMMERCIAL EDUCATIONAL BROADCAST STATION AND PUBLIC BROADCAST STATION PROCESSING --

Section 5(c)(1) (47 U.S.C. § 155(c)(1)) is amended by inserting into the final sentence, after "instructional fixed television service" the phrase "or stations described in section 397(6) of this Act (47 U.S.C. § 397(6))."